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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL COMMUNICATIONS COMMISSION and
RICHARD L. THORNBURGH, ATTORNEY GENERAL
OF THE UNITED STATES,
Appellants,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellee.

On Appeal from the United States District Court for the Central District of California

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BRIEF OF AMICI CURIAE JANE ROE, JOHN DOE, INC., AND THE CONSENTING ADULTS TELEPHONE RIGHTS ASSOCIATION IN SUPPORT OF APPELLEE

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INTEREST OF AMICI [1]

Amici Jane Roe, John Doe, Inc., and Consenting Adults Telephone Rights Association ("CATRA") are the plaintiffs in *Roe v. Meese*, 689 F. Supp. 344 (S.D.N.Y. 1988), in which the court granted a preliminary injunction against enforcement of the same "indecency" prohibition

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[1] Appellants and Appellee have both consented to the filing of this *amicus* brief. Their letters of consent are being lodged with the Clerk.

at issue in this appeal. *Amici* are all involved in the business of engaging in or facilitating live, private, two-way telephone conversations, often of a frankly sexual nature, with adults who request such conversations and pay for them in advance by credit card.[2] Such conversations range in length from ten to thirty minutes. Typically, about half the conversation is sexually oriented.[3]

Amici filed suit in New York at virtually the same time appellee Sable filed the instant litigation in California. Although engaged in a different business from Sable--live conversations rather than pre-recorded messages—*amici* were similarly threatened with prosecution and civil proceedings under 47 U.S.C. § 223(b), as amended. *Amici* obtained preliminary injunctive relief similar to that obtained by Sable.[4]

Although the Government acknowledges that the live service provided by *amici* is "unlike" the service provided by pre-recorded message companies, *see* Brief for the Cross-Appellants/Appellee FCC *et al.*, at 6, n.3 ("App. Br."), and although the Government has chosen, apparently for tactical reasons, to appeal only the Sable injunction and not the injunction obtained by *amici* in the

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[2] Jane Roe is a pseudonym for an adult resident of New York. John Doe, Inc., is a pseudonym for a New York corporation. CATRA is an association, all of whose members are engaged in the business described in text. CATRA sued in the district court and appears here on its own behalf and on behalf of its members.

[3] One objective of this business is to develop a personal relationship with the callers so that they will call back and request the other party to the conversation by name. Consequently, the conversations typically include non-sexual subject matter, such as the callers' personal lives, occupations, interests in sports or politics, etc.

[4] "We preliminarily enjoin enforcement of 47 U.S.C. § 223(b) as it pertains to 'indecent' speech and permanently enjoin enforcement of this statute if such enforcement proceeding is based on 'indecent' conversations occurring while the preliminary injunction is in effect. All relief requested relating to 'obscene' conversations is denied." *Roe v. Meese*, 689 F. Supp. at 348.

New York litigation, the questions presented in the Government's appeal (and in Sable's cross-appeal) encompass not only the pre-recorded messages at issue in the *Sable* litigation, but also live conversations pre-paid by credit card. Thus, a ruling by this Court could directly affect the relief *amici* have obtained in their case.

SUMMARY OF ARGUMENT

The Government argues that this Court should reverse the judgment of the District Court regarding "indecency" because the pre-recorded messages criminalized by section 223(b) are allegedly like the mid-afternoon radio broadcasts at issue in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Live, private, two-way telephone conversations, however, are wholly unlike radio broadcasts. *Pacifica* affirmed the FCC's time-shifting regulation of "indecent" speech on the narrow ground that broadcast speech has traditionally been subject to regulation due to its unique character. In particular, the FCC had found that children inevitably would be in the broadcast audience during the daytime, so the only way to assure that many children did not hear a particular broadcast would be to require that the broadcast be presented in the evening. Few if any of the relevant special features of broadcasts apply to live, two-way, private telephone conversations between consenting adults criminalized by section 223(b). No minors, by definition, take part in such conversations. The First Amendment does not allow Congress to ban indecent but non-obscene constitutionally-protected conversations between consenting adults on the ground that a minor might conceivably take part in *another* conversation of a similar nature. Point I(A)(1).

Even if, *arguendo*, it were constitutional to criminalize private, two-way "indecent" conversations between consenting adults on the ground that minors might participate in different conversations of a similar nature, no such law would be constitutional absent a showing that minors

did *in fact* participate in such live indecent conversations. Indeed, it is concededly central to the Government's argument that the indecent speech criminalized by section 223(b) is "readly accessible to children." App. Br. at 19. *See, e.g., id.* at 27-28, 31, and 33. But on three separate occasions the FCC has ruled that minors have "virtually no access" to live telephone services such as those represented by *amici* that require pre-payment by credit card. Indeed, there is no evidence in the administrative, congressional, or judicial record (including the records in the instant case and *Roe v. Meese, supra*) that *any* minor has *ever* gained access to a live credit card service covered by the Act. For that and several other reasons, *Pacifica* is inapposite and § 223(b) is unconstitutional as applied to live, credit card services paid for in advance by credit card. Point I(A)(2).

Accordingly, even if a total ban of indecent *pre-recorded* messages would be constitutional, § 223(b)'s manifest and substantial overbreadth renders it void on its face. *E.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973). The Court should therefore affirm the "indecency" ruling rendered below. Point I(B).

If the Court nevertheless rejects *amici's* overbreadth argument, it should in any event recognize the substantial differences between live, private, two-way "indecent" telephone conversations, and pre-recorded telephone messages that can be heard by many people at the same time, and should explicitly reserve judgment on the constitutionality of the Act as it applies to live conversations prepaid by credit card. Point II.

ARGUMENT

I. CONTRARY TO THE GOVERNMENT'S CLAIM, SECTION 223(b)'S PROHIBITION OF "INDECENT" SPEECH CRIMINALIZES A SUBSTANTIAL AMOUNT OF SPEECH THAT IS CONSTITUTIONALLY PROTECTED FOR ADULTS AND IS VIRTUALLY INACCESSIBLE TO MINORS. BECAUSE THAT PROHIBITION IS PLAINLY OVERBROAD, THIS COURT SHOULD AFFIRM THE LOWER COURT'S "INDECENCY" RULING.

Amici believe that section 223(b) is unconstitutional in all of its applications, because the First Amendment prohibits the Government from criminalizing speech that is constitutionally protected for adults on the basis of a legislative "fact-finding" that such a complete prohibition is needed to "preclud[e] access by minors altogether." App. Br. at 33. We live in a society where children mingle freely with adults and have access to most of the avenues of communication used by adults. Regardless of the mode of communication at issue, therefore, the only way to *ensure* that access is denied to children "altogether" is to deny it to adults "altogether." If protected adult speech could be banned in order to preclude access by minors, then the adult population could be reduced "to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). It has been clear since *Butler*, however, that protected speech may not be so proscribed. Indeed, in the present context, until Congress amended the statute in 1988, the FCC had, in its own words, "consistently regarded a total ban on the dissemination of indecent, but not obscene, material to be beyond the bounds permitted by *Pacifica*."[5] The Depart-

[5] Testimony of the General Counsel of the FCC, *Telephone Decency Act of 1987: Hearing on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 246, 250 (1987).

ment of Justice has taken a similar position,[6] as has every court to have considered the question.[7]

Even if section 223(b) were not unconstitutional in *all* of its applications, however, it still is facially invalid. As *amici* demonstrate below, the provision is plainly unconstitutional as applied to live, private, two-way telephone conversations of the type provided by *amici*. In what follows *amici* demonstrate: (A)(1) the Government could not criminalize "indecent" private two-way conversations between adults even if it could demonstrate that minors might conceivably participate in different indecent conversations; (A)(2) in any event, there is *no* evidence that minors actually take part in such conversations, and considerable evidence to the contrary, and there can therefore be *no* rationale for extending the doctrine of *Pacifica* to validate criminalization of such conversation; and (B) as such the provision is substantially overbroad and so facially invalid.

A. The Government May Not Prohibit and Criminalize "Indecent" Live, Private, Two-Way Telephone Conversations Between Consenting Adults Paid For In Advance By Credit Card.

1. *The Government Could Not Criminalize "Indecent," Live, Private Two-Way Telephone Conversations Between Consenting Adults Even If It Could Demonstrate That Minors Participate In Similar Conversations.*

Assuming that "indecency" is defined equivalently to "obscene as to minors," Congress may criminalize "in-

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[6] Statement of the United States Attorney for the District of Utah, representing the Department of Justice. Hearings, *supra* n.5, at 258.

[7] *See Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 560 (2nd Cir.), *cert. denied*, 109 S.Ct. 305 (1988); *Roe v. Meese*, 689 F. Supp. 344, 346-47 (S.D.N.Y. 1988); *Sable Communications, Inc. v. FCC*, 692 F. Supp. 1208, 1209 (C.D. Cal. 1988).

decent" speech between a minor and an adult, even though that same speech between two adults would be constitutionally protected. *Ginsberg v. New York*, 390 U.S. 629 (1968). And, as the Court made clear in its narrow holding in *Pacifica*, the FCC may impose limited time shifting regulations to minimize the number of minors who might gain access to broadcasts containing indecent language, even though the time shifting would force adults who wish to hear these broadcasts to hear them at a later time. Nothing in these cases, or in any other case, however, lends any support to the proposition that the Government may criminalize private indecent speech to which no minor has access as a way to ensure that no minor could ever take part in a completely different conversation.

This Court has consistently rejected the proposition that Government can prohibit speech protected as to adults in order to insure that no minor will ever gain access to it. In *Butler v. Michigan*, 352 U.S. 380 (1957), the Court squarely rejected the State's assertion that it could "quarantin[e] the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence." *Id.* at 383. The Court explained that this legislative approach was "not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." *Id.* Similarly, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court struck down a statute that prohibited unsolicited mailing of contraceptive advertisements to adults and minors alike despite the Government's claim that without such an absolute ban some minors could gain access to those ads. The Court explained that "a restriction of this scope is more extensive than the Constitution permits. . . . The level of discourse reaching a mailbox simply cannot be limited to

that which would be suitable for a sandbox." *Id.* at 73-74 (citation omitted).

Recently, in *Wilkinson v. Jones*, 480 U.S. 926 (1987), the Court reviewed the Tenth Circuit's holding that a statute banning "indecent" cable television programming violated the First Amendment. Before the lower courts and on appeal to this Court, the State argued that outright prohibition of "indecent material" on cable television was necessary to protect children. Both the District Court and Court of Appeals rejected the State's contention and found that the statute unconstitutionally impaired the First Amendment rights of adults. *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985); *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). This Court summarily affirmed the lower court's decision striking down the statute. *Wilkinson v. Jones*, 480 U.S. 926 (1987).[8]

Just last term, the Court confirmed that statutes affecting speech must be narrowly tailored, and explained that a statute is narrowly tailored *only* "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Shultz*, 108 S.Ct. 2495, 2502 (1988) (citing *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810 (1984)). The *Frisby* Court also confirmed that a "complete ban" on speech can be justified "only if *each activity* within the proscription's scope is an appropriately targeted evil." *Id.* (emphasis added).

Section 223(b) cannot survive scrutiny under *Frisby*, *Wilkinson*, *Bolger* and *Butler*. Here, Appellants do not

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[8] *Accord Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (affirming lower court's decision to enjoin enforcement of ordinance prohibiting cable distribution of any "obscene or indecent material"); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982) (holding statutory prohibition of "indecent" cable programming unconstitutional).

even argue that *adult* access to "indecent" speech is an evil that Congress could separately target and proscribe. Yet section 223(b) was deliberately amended to criminalize such adult access. Unlike the cablecasts in *Wilkinson*, the mass mailings in *Bolger*, and the books in *Butler*, there is no reason to believe any minor has gained access to a private telephone conversation accessed by an adult. The statute bars such adult conversations *not* to avoid exposure by children to the particular adult conversation deemed indecent, but as a purely prophylactic measure—to assure that no minor could ever participate in an entirely different telephone conversation. Accordingly, section 223(b)'s complete ban on "indecent" telephone speech is even *less* tailored to the evil at which it is directed than the laws struck down in the cases cited above. It plainly violates the First Amendment because it is not narrowly tailored to proscribe the only evil—access by minors—Appellants contend Congress could constitutionally proscribe.

The FCC's suggestion—rejected in Congressional testimony by its General Counsel in 1987[9]—that *Pacifica* sanctions such infringement of all adults' First Amendment rights should be dismissed out of hand. In *Pacifica*, the Court approved a regulation that restricted the time for broadcast of certain "indecent" programming because that minimized minors' access to the programming without preventing adults' access. But in so ruling the Court explicitly "emphasize[d] the narrowness of our holding." 438 U.S. at 750. The Court later reemphasized this point in *Bolger*, stating that the government's interest in regulating broadcasting does "not readily translate into a justification for regulating other means of communication." 463 U.S. at 74. In spite of these warnings, Appellants ignore or paper over the substantial differences between *Pacifica* and the issues presently before the

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[9] *See* n.5, *supra*.

Court, and request a dramatic expansion of that narrow holding. But the distinctions between the time-channeling regulation reviewed in *Pacifica* and a criminal prohibition of "indecent" speech by live telephone services are clear and substantial:

(1) *Pacifica's* approval of the FCC's time-channeling regulation was based explicitly and narrowly on the fact that broadcast speech has traditionally been subject to substantial regulation because of its unique characteristics. *See* 438 U.S. at 758-759 (Powell, J., concurring). Crucially, the FCC determined that the program at issue in *Pacifica* "w[as] broadcast at a time when children were undoubtedly in the audience." 56 F.C.C. 2nd, at 99, cited at 438 U.S. at 730. Because a broadcaster during the daytime "cannot reach willing adults without also reaching children," *id.* at 758-759 (Powell, J., concurring), the Court was willing to fashion a narrow exception to the principle established in *Butler v. Michigan*, 352 U.S. 380 (1957), that the legislature may not limit speech which adults are constitutionally entitled to hear in order to protect children.

These concerns unique to broadcast media are in no way present in private live two-way telephone conversations. A principle feature of private conversations between two adults is that the rest of the world, adults and minors alike, is excluded.[10] In such conversations it is *not* the case that the proscribed conversation may not be

[10] Although the Appellants argue that the "similarity" of telephone services to broadcasting is "underscored" because prerecorded messages can be provided to thousands of callers "simultaneously," App. Br. at 28, that claim is not true in the case of live telephone services paid for by credit card. Even with prerecorded services, the better analogy is to *cable* television, not broadcasting, because the messages are confined to cable transmission, not sent through the air. As noted, cable television may not be subjected to "indecency" regulation. And even as compared to cable television, of course, it is far less likely a child will overhear a telephone message or conversation than a television message.

held with an adult without children participating in the same conversation. The possibility that a different indecent conversation between an adult and a child could theoretically take place does not alter the protected nature of the adults' conversation. Nothing in *Pacifica* lends support to the blunderbuss constitutional rule proposed by Appellants, which would justify a ban on speech between two consenting adults on the ground that such a ban is the only way to insure "that some enterprising minors will never hear" an entirely different but also "indecent" message. App. Br. at 35. The FCC's test would, of course, overturn *Butler*, *Bolger* and *Wilkinson*, and go still further: on the theory that similar speech *could* be heard by children, or that the age of the participants could be (but was not) mistaken, it would justify criminalization of *any* indecent speech (or speech obscene only as to minors) even if the speaker could prove no minor in fact gained access.

(2) Section 223(b) imposes criminal penalties, including substantial fines and imprisonment. The regulation upheld in *Pacifica* involved only administrative action, and the Court expressly noted that it was *not* deciding whether the same speech could be subjected to criminal sanctions. 438 U.S. at 750.

(3) Section 223(b) imposes an outright ban on speech covered by the statute. The regulation in *Pacifica* was a mere time-channeling provision. Indeed, the FCC had emphasized that its regulation was "never intended to place an absolute prohibition on the broadcast" of the speech there at issue. 438 U.S. at 532-33. *See also id.* at 750; *id.* at 760 (Powell, J., concurring).

(4) The FCC's argument that this case is similar to *Pacifica* because "adults remain free to purchase recordings containing the identical messages at book or record stores," App. Br. at 34, is completely invalid in the context of live services. These interactive, personalized conversations, often with a specific individual requested by

the caller, cannot be purchased at a record or book store. In any event, the availability of similar speech in a different medium was not and should not be the touchstone of *Pacifica*. The Court's point there was that the *same* speech was available to adults through the *same* medium at a different time of day. Availability of motion pictures at video stores hardly renders motion picture theaters or cable television subject to "indecency" regulation. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232-233 (1987).

(5) Contrary to the Government's contention, it cannot reasonably be argued that this case is like *Pacifica* because the speech at issue is an "intruder" that invades the " 'privacy of the home' " and interferes with " 'the individual's right to be left alone.' " App. Br. at 28 (quoting *Pacifica*, 438 U.S. at 748). In *Pacifica*, the Court expressed concern that because "the broadcast audience is constantly tuning in and out" individuals might be confronted with "unexpected program content." 438 U.S. at 748. Obviously, live telephone services paid for in advance by credit card do not impinge upon the individual's "right to be left alone" in that or any other sense—calls are initiated by the caller, not the telephone service, and the conversations are individualized, not part of a stream of other programming.

(6) The *Pacifica* regulation was supported by FCC fact-findings, while section 223(b) is not: the FCC had expressly determined that the regulatory action at issue in *Pacifica* was a necessary and reasonable means to channel indecent speech " 'to times of day when children most likely would not be exposed to it.' " 438 U.S. at 733 (quoting the FCC). In contrast, the FCC has determined three times that minors can effectively be denied access to live telephone services by methods (*i.e.*, the credit card requirement) far less draconian than section 223(b)'s blanket prohibition.

(7) Finally, the substantial control parents exercise over access by their children to credit cards, *see Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Report and Order*, 49 Fed. Reg. 24998, 25001 (1984) (*"First Report and Order"*); *cf. Bolger*, 463 U.S. at 73 (parental control over incoming mail), contrasts sharply with the difficulty of parental control over minor's access to radio in the early afternoon, *Pacifica*, 438 U.S. at 732 (quoting the FCC).

In short, the mere possibility that minors could participate in live "indecent" telephone conversations cannot possibly justify a statute that criminalizes such constitutionally protected telephone conversations between consenting adults. Nothing in *Pacifica*, or in any other case, supports the application of section 223(b) to providers of live, private, two-way "indecent" telephone conversations with adults.

2. *"Indecent," Live, Telephone Conversations Between Consenting Adults Are Constitutionally Protected In Any Event Because There Is No Evidence That Any Children Participate In Similar Conversations.*

Even if Congress could criminalize live telephone conversations between consenting adults because it was determined that minors *would* gain access to different but similar speech—and it cannot—still, Congress may not so legislate here; there is absolutely *no evidence* that minors in fact participate in such live two-way conversations pre-paid by credit card. The FCC's effort to condemn *all* "dial-a-porn" on the ground that it is "readily accessible to minors," App. Br. at 31, ignores the critical differences between live services paid for by credit card and pre-recorded services, and fails to heed the government's own warning that "careful analysis of the particular medium at issue is necessary before the reasoning of *Pacifica* is extended outside the broadcasting medium." App. Br. at 27, n. 17.

When Congress originally passed section 223(b) in 1983, it directed the FCC to issue regulations providing defenses to prosecution when a telephone message service had taken steps that effectively prevented minors from having access to that service. In promulgating those regulations, the FCC consistently has recognized the important differences between live telephone services paid for by credit card holders, and pre-recorded messages services (which cannot practicably impose a credit card requirement).[11]

Contrary to the Government's suggestion, gaining access to live services is certainly not "as easy as turning on a radio or television set." App. Br. at 28. In fact, the regulatory and congressional record makes clear that minors have *virtually no access* to live, two-way services accessed only by use of a credit card.

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[11] In 1983 in those regulations the FCC determined that live services could comply with section 223(b) by requiring payment by credit card before permitting access to their services. Even before that decision, most live services imposed such a requirement. In the case of pre-recorded message services, however, the FCC has determined that such a requirement "would be impractical, as those services allow multiple calls to access a message simultaneously." First Report and Order at 24998.

More recently, however, the FCC has determined that new technology could serve a similar screening function for pre-recorded services, *see Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order*, 2 F.C.C. Rcd. 2714, 2721-22 (1987), and the Second Circuit agreed. *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (1988). If this Court were otherwise to agree with appellants' present submission that ease of access to pre-recorded services would render the statute constitutional as applied to such services (a ruling that would depart substantially from this Court's prior decisions), and for some reason were to reject *amici's* overbreadth argument, then this Court in deference to the FCC should affirm the preliminary injunction in the instant case and remand for fact-finding on the efficacy of the new technology approved by the FCC in its *Third Report and Order*.

The FCC reached this conclusion on three separate occasions after careful investigation and "based upon [its] four-year effort to promote maximally effective, valid regulations." App. Br. at 32. In its *First Report and Order*, the FCC concluded that:

> imposition of a credit card restriction upon [live] "dial-a-porn" providers *will effectively ensure that minors are denied access to such services.* The age requirement for obtaining a credit card combined with the fact that minors who are issued credit cards are usually subject to parental supervision as to use of the card, should effectively prevent access by underage callers.

First Report and Order at 25001 (emphasis added.)[12]

In October 1985, after receiving numerous comments from interested persons and after "careful consideration of the record," the FCC again determined that requiring payment by credit card effectively restricts minors' access to live services. *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Second Report and Order*, 50 Fed. Reg. 42699, 42701, 42706 (1985) ("*Second Report and Order*"). The FCC explained:

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[12] The FCC's decision on this point was upheld by the United States Court of Appeals for the Second Circuit in *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 118-19 (2d Cir. 1984). In addition to requiring payment by credit card, live services take other steps to prevent access by minors. For example, it is common practice for live services to ask a caller if he has a telephone listed in his own name, and then verify that fact through directory service before authorizing service for the caller. If the caller does not have a listing in his own name, no service will be provided. Independent of such screening techniques, the cost of access to live services—which is approximately $35-$50, as opposed to a few dollars for services that provide pre-recorded messages—is likely to dissuade minors from using live services, particularly since this cost will later appear on a credit card bill sent to the home. Finally we doubt that many children's "natural curiosity about sex and adult behavior," App. Br. at 29, would lead them to initiate live sexually-explicit conversation with a stranger.

> In our [First] Report and Order we concluded that requiring prepayment by credit card effectively restricts minors' access to live "dial-a-porn" transmissions . . . . [N]ot finding any reason to reach a contrary conclusion in the augmented record, we find that this credit card provision is a suitable adjunct to the regulation we adopt today regarding recorded messages.

Id. at 42706. In its *Third Report and Order*, the FCC reached the same conclusion for the third time, finding that requiring pre-payment by credit card would ensure that minors would have "virtually no access" to live services. *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order*, 2 F.C.C. Rcd. 2714, 2724 n.14 (1987).[13]

Throughout the FCC's three investigations there was *no evidence*, or even *claim*, that *any* minors have gained access to live, credit card services. In its *Second Report and Order*, the FCC stated that "*no party submitting comments in this proceeding claims that the credit card restriction is ineffective to meet the mandate of Congress.*" *Second Report and Order*, 50 Fed. Reg. at 42706, n.56 (emphasis added).[14]

Similarly, throughout the congressional hearings and debates on section 223(b) as enacted, and on proposed

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[13] Indeed, the FCC believed that its statutory mandate permitted it to approve measures designed to screen out minors *only* if those measures would be "highly effective" and would ensure that minors would have "virtually no access" to adult telephone services: "As we interpret this statute, a ***high degree of effectiveness*** is contemplated so that if access is restricted to adults, as stated by the statute, minors will have ***virtually no access to adult message services.***" *Third Report and Order*, 2 F.C.C. Rcd. at 2724 n.14 (emphasis added).

[14] Nothing in the *Third Report and Order*, which reaffirmed the credit card requirement, suggests that any such evidence or claim was submitted during that investigation.

amendments, there was no evidence of even one minor gaining access to live, credit card services. To the contrary, the legislative activity surrounding section 223(b) overwhelmingly focused on concerns about minors' access to *pre-recorded* message services and *every* example of minors' access cited by the FCC or others involved a *pre-recorded* message.

Perhaps most telling of all, in this litigation and in the New York litigation filed by *amici* (which focuses specifically on live services), the Government has failed to offer even a single complaint that a minor gained access to a live, credit card service. Accordingly, in the context of live services, there is no basis whatsoever for the Government's contention that indecent speech is "readily accessible" by minors.

Appellants must therefore claim that access by minors, though "virtually" impossible, is not "totally" or "absolutely" impossible. App. Br. at 35.[15] But the fact that it is not "totally" impossible for minors to gain access to constitutionally protected "indecent" speech cannot justify a wholesale prohibition of that speech, even if such a prohibition were otherwise justified. If Government could constitutionally prohibit "indecent" speech unless it were absolutely certain that no minor could ever gain

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[15] Appellants' argument appears to be that even if a credit card requirement would be an "effective" way to prevent access by minors, as the FCC has repeatedly found, that requirement would not "totally" or "absolutely" preclude access by minors. In Appellants' view, total effectiveness is a "valid" legislative goal that justifies abridgment of adults' rights to have access to non-obscene speech: "And, given the nature of the telephone system, the lesser measures proposed by the FCC in its rulemaking proceedings, *effective as they were*, could not achieve the valid end of precluding access by minors *altogether*." App. Br. at 33 (emphasis added). *See id.* at 35 (stressing FCC statement that no requirement can guarantee "absolute impossibility of access," but ignoring preceding sentence making clear FCC believed credit card requirement guaranteed "virtually no access").

access to that speech, it could prohibit *all* "indecent" speech—or other speech deemed potentially harmful to minors—in *all* media. To preserve adult access to speech that is protected for adults, the First Amendment requires that we accept some risk that minors may occasionally gain access to it. We permit adults to watch "R" rated movies while recognizing that minors may occasionally sneak in to see those movies; we permit adults to rent videotapes for home viewing that are "indecent" or even obscene as to minors while recognizing that some adults may permit minors to view those movies, or that minors may gain access without permission; and we permit adults to purchase books and magazines with sexually explicit or otherwise "indecent" content even though some minors will inevitably gain access to those books and magazines. And all of those media are *more* accessible to minors than a private, two-way conversation for which a credit card is required. In sum, even if a complete ban on pre-recorded messages were necessary to prevent minors' access to them—a contention *amici* dispute—it is incontrovertible that the statute's outright ban on live, credit card services is *not* necessary, because minors have virtually no access to them.

B. Because Section 223(b) Purports To Criminalize "Indecent" Live, Two-Way Conversations Paid For By Credit Card, It Is Substantially Overbroad And Therefore Unconstitutional On Its Face.

For the foregoing reasons, even if the First Amendment permitted criminalization of pre-recorded messages that are not obscene (a proposition which is strongly at odds with this Court's decisions discussed above), the statute is facially unconstitutional. It is well established that statutes that "make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application," and that "[c]riminal statutes must be scrutinized with particular care." *City of Houston v. Hill*, 482 U.S. 451, 457

(1987). *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). *Cf. Frisby v. Schultz*, 108 S.Ct. at 2504 (White, J., concurring).

It is indisputable that live services engage in a very substantial amount of the speech criminalized by section 223(b)'s "indecency" prohibition. As explained above, throughout the FCC's "four year effort to promote maximally effective, valid regulations," App. Br. at 32, the FCC consistently recognized the substantial volume of calls handled by live services, and established the credit card defense for live services recognizing it was unavailable to pre-recorded services. *See* n.11, *supra*; *see, e.g., First Report and Order* at 24998. As amended, section 223(b) ignores these differences and explicitly criminalizes "direct[]" as well as recorded communications. 47 U.S.C. § 223(b)(1).

The statute is capable of application in a very substantial number of cases where its application would be unconstitutional—all live credit card conversations. The chill created by the overbroad application of the Act to live services is not at all speculative. *Amici*, plaintiffs in *Roe v. Meese*, 689 F. Supp. 344 (S.D.N.Y. 1988), won a preliminary injunction enjoining application of the statute to them precisely because it impermissibly chilled their constitutionally-protected live services. Appellants' passing suggestion that the overbreadth of the statute is not substantial, App. Br. at 24, n.15, thus simply ignores the real and substantial chill of protected live, two-way conversations between adults that already has been judicially recognized. *See New York v. Ferber*, 458 U.S. 747, 772, n.27 (1982) (rationale of the "substantial overbreadth" principle "must be that only substantially overbroad laws set up the kind and degree of chill that is judicially cognizable") (citation omitted).

Appellants also argue, however, that two-way communication will not be chilled by the statute—and over-

breadth analysis should not be applied—because, "two way services are readily identifiable as distinct from prerecorded messages." App. Br. at 24 n.15. The suggestion that providers of live conversations are not deterred by a statute that expressly criminalizes their speech is remarkable indeed. To the contrary, the Act is far more susceptible to overbreadth challenge than many other statutes that have been found overbroad precisely because it *does* unambiguously punish a significant volume of clearly protected speech. It in no way diminishes the chilling effect that providers of live services know they are not providing prerecorded messages; the crucial point is that they also know that provision of live, two-way, indecent messages is unlawful.[16] Enforcement of the Act would result in a substantial chilling effect, deterring *amici* and other businesses from engaging in plainly constitutionally protected activity. It is to prevent just such a chilling effect that substantial overbreadth doctrine was created.

II. IF THE COURT DETERMINES THAT THE STATUTE IS NOT SUBSTANTIALLY OVERBROAD, IT SHOULD NEVERTHELESS MAKE CLEAR THE SUBSTANTIAL AND RELEVANT DIFFERENCES BETWEEN PRE-RECORDED MESSAGES AND LIVE, TWO-WAY PRIVATE TELEPHONE CONVERSATIONS PAID FOR IN ADVANCE BY CREDIT CARD

For the reasons set forth above and in appellee's brief, this Court should affirm the judgment of the district court as to "indecency" either because in all of its applications the statute is unconstitutional, or because, as ar-

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[16] The "chilling effect" of a law that clearly makes protected conduct unlawful is far greater than that of a law that chills by creating uncertainty whether protected conduct is criminalized. The *purpose* of overbreadth doctrine is to prevent the chilling of such protected speech—where it is substantial—even when the parties engaged in protected speech are not before the Court.

gued above, the statute is substantially overbroad insofar as it applies to constitutionally protected private live telephone conversations between adults. If, however, the Court were to agree with the Government's submission, it should nevertheless make clear that its decision does not address the constitutionality of the statute as applied to *amici* and others who provide live, two-way credit card telephone conversations.

Amici have obtained a preliminary injunction enjoining application of section 223(b) against them. *See Roe v. Meese*, 689 F. Supp. 344 (S.D.N.Y. 1988). The United States has chosen not to appeal that preliminary injunction. Before this Court, the United States has taken the position that the constitutionality of live, credit card services "is not at issue in the present case, as Sable's complaint here alleges only that Sable sells prerecorded messages." App. Br. at 6, n. 3. *Amici* have demonstrated above that the constitutionality of live, credit card services *is* at issue, since by proscribing such speech section 223(b) is substantially overbroad. Assuming, *arguendo*, that the Court does not adopt *amici's* substantial overbreadth argument, *amici* agree that the Court need not address the constitutionality of section 223(b) as it applies to live, credit card providers in order to resolve the present case. However, because both *Roe v. Meese* and the present case involve interpretation of the identical statute, and in light of the ongoing litigation in *Roe*, if this Court were somehow to rule that section 223(b) can constitutionally prohibit indecent pre-recorded messages, it should make clear that it is *not* ruling that the statute is constitutional as applied to live credit card providers such as *amici*.

CONCLUSION

For the foregoing reasons, the judgment of the District Court enjoining enforcement of section 223(b) insofar as it applies to indecent speech should be affirmed.

Respectfully submitted,

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